PT Vision Renewable Fuels v Export-Import Bank of Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO D-22–1109 OF 2009
ASMABI MOHAMAD JC
26 FEBRUARY 2014

Contract — Breach — Termination — Proof, of — Whether party terminating contract can rely on other grounds of termination not stated in letter of termination

Contract — Misrepresentation — Damages — Lender induced by misrepresentation to issue letter of offer for financing facilities — Borrower in breach of duty to disclose truthful information on material facts — Whether lender entitled to damages for misrepresentation

Contract — Offer — Revocation — Letter of offer for financing facilities revoked by lender — Whether borrower had fundamentally breached terms and conditions of the letter of offer — Clause in letter of offer entitling lender to revoke offer if the granting of the facility was prejudicial to lender's interest — Contracts Act 1950 s 40

Contract — Terms — Validity — Whether clause negating liability for any damages or loss valid — Whether amounting to contracting out of the Contracts Act 1950 — Whether clause can be challenged after having accepted the same

Evidence — Judicial notice — Public record — Whether court could take judicial notice of data forming part of the records of MPOB — Evidence Act 1950 s 57

The plaintiff had applied to the defendant for a fixed term loan facility for the purpose of constructing a 300,000 metric ton capacity per year 'biodiesel plant' in Batam Island, Indonesia ('the project'). Vide its letter of offer dated 8 January 2007 ('the LO'), the defendant approved the term loan under buyer credit facility amounting to USD42.0m in favour of the plaintiff with the indicative terms and conditions contained therein. The plaintiff accepted the terms and conditions stipulated in the LO. The plaintiff subsequently brought this claim against the defendant alleging wrongful termination or revocation of the LO. The plaintiff contended that it had accepted the defendant's offer and

had performed the terms and conditions precedent set out in the said LO and that therefore there existed a legally binding relationship between the plaintiff and the defendant. According to the plaintiff, the defendant's act of revoking the LO was wrongful and had caused the plaintiff to suffer losses. The defendant claimed that it had validly revoked the LO as the plaintiff had committed fundamental breach of the terms of the LO. According to the defendant, the plaintiff had unilaterally changed the Project location from Batam Island to Dumai Port. Beside that the plaintiff too had unilaterally decided to increase the capacity of the project from the 300,000mt per annum agreed earlier to 400,000mt per annum. The defendant claimed that by doing so the plaintiff had deviated from the indicative terms and conditions agreed upon earlier vide the LO. Further the defendant contended that the LO was vitiated by the plaintiff's misrepresentations and hence it was voidable at the option of the defendant. The defendant also pleaded that the plaintiff had breached its duty in giving and/or representing the false statements to the defendant at the material time which had induced the defendant to issue the LO the consequence of which had resulted in the defendant suffering damages. Therefore the defendant prayed that the LO be declared terminated and sought damages for misrepresentation to be assessed. The defendant claimed that it was justified in invoking cl 29 of the LO which gave the discretion to the defendant to revoke the LO if the granting of the facility was prejudicial to the defendant's interest. Further under this clause the defendant shall not in any way be liable for damages or loss howsoever suffered by the plaintiff as a result of revocation of the LO. The plaintiff alleged that cl 29 prohibited the plaintiff from pursuing its remedies allowed by the law such as damages for breach of contract in the event the LO was rejected. Therefore, the plaintiff claimed that cl 29 was void which rendered the revocation of the LO unlawful. Clause 29 was said to contain uncertain terms and therefore to be bad in law under s 30 of the Contracts Act 1950 ('the Act').

Held, dismissing the plaintiff's claim with costs and allowing the prayers sought by the defendant:

(1) The plaintiff had failed to establish its claim that it had performed the terms and conditions of the LO with credible evidence (see para 73).

(2) The approval of the facility was based on the financial dtudy prepared by the plaintiff with the view of having the project located in Batam Island. That being the case the plaintiff ought not to unilaterally change the project site as it pleased. The plaintiff's departure from the clear terms of the LO tantamounted to a refusal on the part of the plaintiff to honour and fulfil the terms and conditions stated in the LO. Hence the plaintiff had refused to perform its part of the bargain and/or had disabled itself from performing the promise in entirety as stated in the LO. The defendant was thus entitled to rely on s 40 of the Act. Hence the defendant was justified in revoking the LO (see paras 76 –77).

(3) The plaintiff had agreed to cl 29, in that, giving the discretion to the defendant to revoke the LO if in the subsequent opinion, the defendant found that the granting of the facility is prejudicial to the defendant's interest. In such circumstances the defendant was not liable for any damages or loss howsoever suffered by the plaintiff as a consequence of the defendant revoking the LO. Having agreed to this term it was not opened to the plaintiff to dispute the same subsequently. Parties to an agreement can by agreement contract out of the Act unless the terms are clearly inconsistent with the Act (see paras 88 & 91).

(4) The terms of cl 29 were clear, unequivocal and did not contain any ambiguity that the court must interpret in order to give effect to the clear words of cl 29. Hence, the plaintiff's challenge with regard to cl 29 of the LO was without any basis. The defendant had rightfully exercised its discretion under cl 29 of the LO citing the reason 'due to unfavourable biodiesel market outlook' (see paras 92–93).

(5) The credit risk analysis report prepared by DW2 showed that the average CPO price was higher than the assumed biodiesel selling price. In the course of preparing the report, DW2 had relied on the public record of MPOB where the data extracted form part of and/or was based on data, which formed part of the records of MPOB, which is a governmental body, entrusted with the task to promote and develop the palm oil industry. MPOB is also responsible to furnish its records and/or information to the public at large as the government's initiative in promoting the industry. Hence, pursuant to s 57 of the Evidence Act 1950 the court was entitled to take judicial notice of the public records and accept it as evidence (see paras 93–94).

(6) There were elements of misrepresentations involved in the dealings with the defendant and the plaintiff had caused the defendant to be induced to issue the LO to part-finance the project by these misrepresentations. The plaintiff had a duty as an applicant for the said financing to disclose truthful information with regards to all facts which were material to the application for the same to be considered by the defendant. The plaintiff had breached its duty of care to the defendant by making those misrepresentations (see paras 105–106).

(7) Despite the fact that the defendant had only stated in the revocation/termination letter that the LO was revoked based on unfavourable market outlook for biodiesel, it did not mean that the defendant could not rely on other grounds that it had discovered later to justify its act in issuing the LO. There is no common rule that it is a condition precedent that a notice must be first given by the defendant correctly, specifying the grounds on which the power is being exercised. The defendant was entitled to justify the revocation/termination if the

object facts which justified the taking of the step existed at the material times even though at the time the steps were taken the defendant did not know of the facts (see para 107).

[Bahasa Malaysia summary

Plaintif telah memohon kepada defendan untuk kemudahan pinjaman berjangka yang ditetapkan bagi tujuan membina 'biodiesel plant' berkapasiti 300,000 tan metrik setahun di Pulau Batam, Indonesia ('projek tersebut'). Melalui surat tawarannya bertarikh 8 Januari 2007 ('ST'), defendan telah meluluskan pinjaman berjangka di bawah kemudahan kredit pembeli berjumlah USD42.0 juta yang memihak kepada plaintif dengan terma dan syarat petunjuk yang terkandung di dalamnya. Plaintif telah menerima terma dan syarat yang ditetapkan dalam ST itu. Plaintif kemudian telah memulakan tuntutan ini terhadap defendan dengan mendakwa penamatan salah atau pembatalan ST. Plaintif berhujah bahawa ia telah menerima tawaran defendan dan telah melaksanakan terma dan prasyarat yang dinyatakan dalam ST tersebut dan bahawa dengan itu terdapat hubungan sah yang wujud antara plaintif dan defendan. Menurut plaintif, perbuatan defendan membatalkan ST itu salah dan telah menyebabkan plaintif mengalami kerugian. Defendan mendakwa bahawa ia dengan sah telah membatalkan ST itu kerana plaintif telah melakukan pelanggaran asas terma-terma ST itu. Menurut defendan, plaintif secara unilateral telah menukar lokasi projek itu dari Pulau Batam ke Pelabuhan Dumai. Selain itu, plaintif juga secara unilateral telah memutuskan untuk menaikkan kapasiti projek itu daripada 300,000 tan metrik setahun sepertimana yang dipersetujui sebelumnya kepada 400,000 tan metrik setahun. Defendan mendakwa bahawa dengan berbuat demikian plaintif telah menyimpang daripada terma dan syarat petunjuk yang dipersetujui sebelumnya melalui ST itu. Selanjutnya defendan berhujah bahawa ST telah dibatalkan oleh salah tanggap plaintif dan justeru ia boleh dibatalkan atas pilihan defendan. Defendan juga memplidkan bahawa plaintif telah melanggar kewajipannya dalam memberi dan/atau mewakili kenyataan palsu kepada defendan pada masa matan yang telah mendorong defendan untuk mengeluarkan ST itu akibat yang menyebabkan defendan mengalami kerugian. Oleh itu defendan memohon agar ST itu diisytiharkan tamat dan memohon ganti rugi untuk salah tanggapan ditaksirkan. Defendan mendakwa bahawa ia dijustifikasikan dengan menggunakan fasal 29 ST itu yang memberikan budi bicara kepada defendan untuk membatalkan ST itu jika dengan memberikan kemudahan itu menjejaskan kepentingan defendan. Selanjutnya di bawah fasal ini defendan tidak patut dalam apa cara bertanggungjawab untuk kerugian atau kehilangan apa pun yang dialami oleh plaintif akibat daripada pembatalan ST itu. Plaintif mendakwa bahawa fasal 29 melarang plaintif daripada memohon remedi yang dibenarkan oleh undang-undang seperti ganti rugi untuk pelanggaran kontrak sekiranya ST itu ditolak. Oleh itu, plaintif mendakwa bahawa fasal 29 adalah terbatal yang menyebabkan pembatalan ST tidak sah. Fasal 29 dikatakan mengandungi

terma-terma yang tidak pasti dan oleh itu tidak bersesuaian dari segi undang-undang di bawah s 30 Akta Kontrak 1950 ('Akta tersebut'). A

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan permohonan yang dipohon oleh defendan: B

(1) Plaintif telah gagal untuk membuktikan tuntutannya bahawa ia telah melaksanakan terma dan syarat ST itu dengan keterangan yang boleh dipercayai (lihat perenggan 73).

(2) Kelulusan kemudahan itu adalah berdasarkan kajian kewangan yang disediakan oleh plaintif dengan pandangan meletakkan projek itu di lokasi Pulau Batam. Jika itu keadaannnya plaintif tidak patut secara unilateral menukar projek itu sesuka hatinya. Plaintif yang menyimpang daripada terma jelas ST itu sama seperti keengganan di pihak plaintif untuk menepati dan memenuhi terma dan syarat yang dinyatakan dalam ST itu. Justeru plaintif enggan untuk melaksanakan bahagian tawarannya dan/atau menahan dirinya daripada melaksanakan janji secara keseluruhannya sebagaimana dinyatakan dalam ST itu. Defendan dengan itu berhak untuk bergantung kepada s 40 Akta tersebut. Justeru itu adalah wajar bagi defendan membatalkan ST itu (lihat perenggan 76–77). C D E

(3) Plaintif telah bersetuju dengan fasal 29, yang mana, dengan memberikan budi bicara kepada defendan untuk membatalkan ST itu jika pada pendapat seterusnya, defendan mendapati bahawa dengan memberikan kemudahan itu memprejudiskan kepentingan defendan. Dalam keadaan sedemikian defendan tidak bertanggungjawab untuk apa-apa kerugian atau kehilangan yang dialami oleh plaintif akibat daripada defendan membatalkan ST itu. Setelah bersetuju dengan terma ini ia tidak terbuka untuk plaintif mempertikaikan yang sama seterusnya. Pihak-pihak kepada perjanjian boleh melalui perjanjian membuat kontrak luar daripada Akta tersebut kecuali terma-terma adalah jelas tidak konsisten dengan Akta tersebut (lihat perenggan 88 & 91). F G

(4) Terma fasal 29 adalah jelas, tidak sah dan tidak menimbulkan kekaburan bahawa mahkamah perlu mentafsir bagi tujuan memberi kesan kepada perkataan-perkataan yang jelas dalam fasal 29. Justeru, cabaran plaintif berhubung fasal 29 kepada ST itu adalah tanpa apa-apa asas. Defendan dengan betul telah melaksanakan budi bicaranya di bawah fasal 29 kepada ST itu dengan memberi alasan 'due to unfavourable biodiesel market outlook' (lihat perenggan 92–93). H I

(5) Laporan analisis risiko kredit yang disediakan oleh DW2 menunjukkan bahawa harga anggaran CPO adalah lebih tinggi daripada anggaran harga jualan biodiesel. Semasa menyediakan laporan itu, DW2 telah bergantung kepada rekod awam MPOB di mana data yang diambil

membentuk sebahagian daripada dan/atau adalah berdasarkan data, yang membentuk sebahagian daripada rekod MPOB, yang merupakan badan kerajaan, yang diberi amanah dengan tugas untuk menggalak dan membangunkan industri minyak kelapa sawit. MPOB juga bertanggungjawab untuk mengemukakan rekodnya dan/atau maklumat kepada orang awam sebagai inisiatif kerajaan untuk menggalakkan industri itu. Justeru, menurut s 57 Akta Keterangan 1950 mahkamah berhak membuat notis kehakiman tentang rekod awam itu dan menerimanya sebagai keterangan (lihat perenggan 93–94).

(6) Terdapat elemen salah tanggap yang wujud dalam urusan defendan dan plaintif yang menyebabkan defendan didorong untuk mengeluarkan ST itu untuk membiayai sebahagian daripada projek itu melalui salah tanggapan tersebut. Plaintif mempunyai kewajipan sebagai pemohon untuk pembiayaan tersebut bagi mendedahkan maklumat sebenar berhubung semua fakta yang material kepada permohonan yang sama dapat dipertimbangkan oleh defendan. Plaintif telah melanggar kewajipan berjaga-jaga kepada defendan dengan membuat salah tanggapan tersebut (lihat perenggan 105–106).

(7) Walaupun pada hakikatnya defendan hanya menyatakan dalam surat pembatalan/penamatan bahawa ST itu telah dibatalkan berdasarkan pandangan pasaran yang tidak berpihak kepada biodiesel, ia tidak bermaksud bahawa defendan tidak boleh bergantung kepada alasan lain yang telah ditemuinya kemudian untuk mewajaran tindakan mengeluarkan ST itu. Tiada peraturan sama di mana ia adalah suatu prasyarat bahawa suatu notis perlu terlebih dahulu diberikan oleh defendan dengan betul, yang menyatakan alasan-alasan tentang kuasa itu dilaksanakan. Defendan berhak untuk menjustifikasikan pembatalan/penamatan jika fakta objektif itu mewajarkan langkah-langkah yang diambil wujud pada masa matan meskipun pada masa langkah-langkah itu diambil defendan tidak mengetahui fakta tersebut (lihat perenggan 107).]

Notes

For a case on revocation, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3483.

For cases on damages, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5550–5551.

For cases on termination, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3430–3450.

Cases referred to

Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor [2011] 5 MLJ 309; [2011] 9 CLJ 133, FC (folld)

Chong Kay Kong v Ching Tong & Ors [1967] 2 MLJ 31, FC (refd)

D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & 3 Ors [1990] 2 CLJ 58 (refd)
Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Innotec Asia Pacific Sdn Bhd v Innotec Gmbh [2007] 8 CLJ 304, HC (refd)
Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor [2004] 7 MLJ 513; [2004] 3 CLJ 272, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd [2010] MLJU 1737; [2011] 3 CLJ 159, CA (refd)
Malayan Banking Berhad v Mawai Products Sdn Bhd (In Receivership) & 3 Ors [1994] MLJU 327 ; [1995] 1 BLJ 43, HC (refd)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420; [2006] 4 CLJ 267, CA (refd)
Ooi Boon Leong & Ors v Citibank & Ors [1984] 1 MLJ 222, PC (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291; [1985] 1 CLJ 541, SC (refd)
Retail Equity Pty Ltd & Ors v Custom Credit Corporation Ltd & Ors [1990-1991] 4 ACSR 23 (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (folld)

Legislation referred to

Contracts Act ss 8, 30, 40
Evidence Act 1950 ss 57, 101(1)

K Selva Kumaran (Rosemmawati Hussin with him) (Rose Hussin) for the plaintiff.
Alan Wong (Megat Abdul Munir and Cliff Seow with him) (Zain Megat & Murad) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] This was a claim by the plaintiff against the defendant for wrongful termination or revocation of the letter of offer dated 8 January 2007 ('LO'). The plaintiff claimed that pursuant to the said LO, the plaintiff was granted a fixed term loan facility for the sum of USD42.0m ('the facility') by the defendant for the purpose of the construction of a 300,000 metric tonnes capacity per year 'biodiesel plant' in Pulau Batam, Indonesia ('the said project').

The plaintiff further contended it had accepted the defendant's offer and had performed the terms and conditions precedent set out in the said LO. Therefore there existed a legally binding relationship between the plaintiff and the defendant and the act of the defendant to terminate or revoke the LO was wrongful and had caused the plaintiff to suffer losses. In its amended statement of claim dated 17 July 2012 ('ASOC') the plaintiff sought from the defendant, amongst others, the following relief:

(a) a declaration that the revocation of the LO dated 8 January 2007 by the defendant was invalid;

(b) a declaration that a specific performance be granted to the plaintiff to proceed with the said LO;

(c) a declaration that the defendant was bound to perform its obligations and responsibilities stipulated in the LO, which is not only limited to the payment of compensation, from the date of revocation till the date of disbursement of the facility granted to the plaintiff;

(d) an investigation of losses, profits and delay and for an order for the defendant to pay all amount due and payable including interest;

(e) damages for breach of contract to be assessed by the court; and

(f) special and general damages, interest and costs.

[2] In their amended defence and counterclaim dated 17 July 2012 the defendant refuted the plaintiff's claim and contended it had validly terminated or revoked the LO as the plaintiff had committed fundamental of breach of the terms of the LO. Further the defendant contended that the LO was vitiated by the plaintiff's misrepresentations hence it is voidable at the option of the defendant. The defendant had also pleaded that the plaintiff had breached its duty in giving and/or representing the false statements to the defendant at the material time which had caused, misled and/or induced the defendant to issue the LO the consequence of which has resulted in the defendant suffering damages. Therefore the defendant prayed for the following relief:

(a) a declaration that the LO dated 8 January 2007 stands terminated;

(b) a declaration that the plaintiff had intentionally and/or fraudulently misrepresented so as to induce the defendant in the issuance of the LO; in the circumstances the LO is void, damages to be assessed and paid to the defendant;

(c) in the alternative, a declaration that the plaintiff had negligently misrepresented so as to induce the defendant in the issuance of the LO; in the circumstances, the letter of offer dated 8 January 2007 is void, damages to be assessed and paid to the defendant;

(d) in the alternative, a declaration that the plaintiff had misrepresented to

the defendant, which had induced the defendant in the issuance of the LO; in the circumstances the letter of offer dated 8 January 2007 is void;

(e) further and/or in the alternative to the above prayers (a)–(d) above, a declaration that the LO has been rightfully revoked and the plaintiff is estopped to challenge the validity of the said revocation; and

(f) general, aggravated, and exemplary damages to be assessed by the court as well as interests and costs.

[3] This case proceeded by way of a full hearing with four witnesses having testified for the plaintiff and three witnesses testified for the defendant.

[4] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all learned counsel for the respective parties on 15 November 2013, I dismissed the plaintiff's claim with costs. I had allowed the defendant's counterclaim with costs. After a brief submissions on the issue of costs I awarded cost of RM30,000 to the defendant in respect of the claim and the counterclaim.

[5] The plaintiff being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

THE DOCUMENTS

[6] The relevant documents referred to in the course of this trial were as follows:

	Documents	Marked
a.	The pleadings	A
b.	Bundle of documents (Part A)	B1
c.	Bundle of documents (Part B)	B2
d.	Bundle of documents (Part C)	B3
e.	Issues to be tried	C
f.	Statement of agreed facts	D
g.	Summary of the plaintiff's case	E
h.	Summary of the defendant's case	F

ISSUES TO BE TRIED

[7] Both parties had framed six issues to be tried (document marked as 'C') as follows:

(a) whether the plaintiff breached the terms and conditions of the letter of offer and therefore warrants the revocation?

(b) whether the letter of offer has come to an end when the plaintiff unilaterally changed the terms and/or inserted new terms into the letter of offer?

(c) whether cl 29 of the letter of offer was rightly exercised?

(d) whether the plaintiff is estopped from challenging the validity of the revocation?

(e) whether the letter of offer is vitiated by misrepresentations?; and

(f) whether the plaintiff is entitled to claim damages?

THE TRIAL

[8] At the outset of the trial learned counsel for the plaintiff had informed the court that the plaintiff was not pursing it's claim for specific performance.

The plaintiff's case

[9] The plaintiff's witnesses were Leong Kian Meng, the ex-executive director of the plaintiff ('PW1'), Boelio Muliadi, the advisor of the plaintiff company ('PW2'), Razuar Yahya, a certified public accountant ('PW3') and Susan Salim an in-house company secretary ('PW4'). The gist of the plaintiff's case, which I had attempted to summarise from the evidence of these witnesses and documents tendered in court are as follows.

[10] The plaintiff was incorporated for the sole purpose of carrying out business of manufacture and production of palm oil Methyl Ester or biodiesel and selling biodiesel and its co-products, Glycerine, to the Indonesian market as well as the international markets. The plaintiff's corporate address was at Jalan Raden Saleh, No 18 D-G, Tingkat 2, Senen, Jakarta Pusat 10430 and its business address was at Jalan Pukat Harimau (Komp Buana Plaza L, VI) RT 000 RW.000 Bantam Timur, Medan Tenbung, Kotamadya Medan Indonesia.

[11] Vide a letter dated 8 September 2006 the plaintiff had submitted an application to the defendant for a fixed term loan facility for the sum of USD425,000 for the purpose of constructing a 300,000 metric tonnes capacity per year 'biodiesel plant' in Batam Island, Indonesia ('the project') (see pp 88–89 of B2). Together with the loan application, the plaintiff had submitted a document known as 'Financial study on PT Vision Renewable Fuels 300,000 metric tonnes Palm Oil Biodiesel Plant' (the 'financial plan') for the defendant's perusal and consideration (see pp 1–87 of B2).

[12] The defendant had agreed to finance the plaintiff's project up to 85% of the costs or USD42m, whichever is lower subject to the defendant having

satisfactorily completed the study of the plaintiff's application upon having full access to the information requested and upon obtaining the approval from the defendant's board of directors. The salient indicative terms and conditions of the financing as stated in the letter dated 28 September 2006 (pp 1–8 of B2) were:

(a) the plaintiff was to remit an earnest deposit of USD50,000, with USD2,500 for processing expenses, legal fees and any other related costs;

(b) in the event the plaintiff's application was rejected the earnest deposit shall be refunded without interest and net of expenses incurred;

(c) if the plaintiff rejected the facility at the point of approval or near approval of the application, the earnest deposit shall be forfeited; and

(d) the indicative terms and conditions were valid for 14 days from 28 September 2006 or until earlier revocation.

[13] The plaintiff had accepted the indicative terms and conditions stated in the abovementioned letter on 9 October 2006 by placing its signature at the respective column as shown at p 8 of the said letter. With the intention to create a legally binding relation with the defendant, the plaintiff then made three remittances in the sum of USD18,000, USD17,000 and USD15,000 respectively amounting to USD50,000 to the defendant (see pp 96–99 of B2) on 12 December 2006 through Westpac Banking Corp.

[14] Vide its letter dated 8 January 2007, the defendant approved the term loan under buyer credit facility amounting to USD42m in favour of the plaintiff with the indicative terms and conditions contained therein (see pp 51–58 of B1). The plaintiff accepted the terms and conditions stipulated in the letter dated 8 January 2006 by signing at the acceptance column at p 58 of B1.

[15] On 26 January 2007, the defendant had informed the plaintiff that the defendant's loan approval board committee of the board had approved the plaintiff's application for the loan. The said letter also stated that Item 24(v) of the letter of offer dated 8 January 2007 which provided for special condition, was to be amended with the new provision stated therein, where the plaintiff was required to build up the debt services reserve account ('DSRA') progressively on proportionate basis based on 6.5% of each drawdown amount until it reaches the DSRA amount. This new condition imposed by the defendant too was accepted by the plaintiff (see p 71 of B1).

[16] Thereupon the plaintiff had embarked to fulfil the terms and conditions imposed by the defendant by:

(a) causing its paid-up capital to be increased to USD7m in preparation for further increase of its share capital to USD12m;

(b) made payment to the technology provider;

(c) made payment towards the acquisition of 20,000sq metre land for the project and to effect its transfer to the plaintiff;

(d) entered into agreements with feedstock suppliers, technology and equipment agreements, turnkey contract and management agreement and off-take agreements;

(e) appointment of consultants, approval of licenses and obtaining of all approvals required for the said project; and

(f) payment for legal fees for preparation of documents.

[17] The plaintiff had by its letter dated 10 October 2006 (see pp 9–10 of B1), 27 November 2006 and 10 January 2007 (see pp 68–69 of B1) written to the defendant seeking for variations of the terms and conditions imposed earlier by the defendant such as:

(a) prepayment of 1%;

(b) security in respect of irrevocable and unconditional personal guarantee from Bapak Boelio Muliadi;

(c) upfront fee of 1% of the facility amount upon signing of the facility agreement; and

(d) special condition in respect of DSRA.

[18] Subsequent to that vide its letter dated 30 March 2007, the plaintiff had made a further request to relocate the project plant from the original site at Batam Island to Dumai Port (see pp 102–103 of B2). This request was made after the plaintiff had carried out due diligence on the cost effectiveness of the project and found that it would be more beneficial and economical to relocate the project to the new site at Dumai Port instead of Batam Island. Amongst the reasons cited were:

(a) the project would be closer to its crude palm oil ('CPO') suppliers and refineries. This meant easy access to the source of the feedstock;

(b) Dumai Port handles 6m tonnes of CPO per annum. The project would be located at the very heart of the CPO supply which is less congested;

(c) the handling charges of the transportation of CPO feedstock would be much reduced;

(d) the plaintiff would be able to save costs by at least USD4m pa in respect of cost of barging from Dumai to Batam Island; and

(e) Dumai would be a biodiesel hub in Indonesia and most companies were locating their operations in Dumai for the same reasons.

[19] The plaintiff had decided to upgrade the plant capacity based on the current world market trends for biodiesel industry. In doing so the plaintiff had considered the following factors:

(a) the increase in the production capacity would be able to support the market drive for greater market share, which would ultimately enable the plaintiff to increase its sale and thus bring in more revenue. This would in turn encourage a faster pay-back for the project;

(b) the higher production capacity which would result in greater efficiency in costs absorption;

(c) low incremental capital costs of USD2.55 which will be covered by advances from shareholders is more than compensated by USD4m savings in costs of barging CPO from Dumai to Batam Island; and

(d) the ability to supply larger quantities of biodiesel from 5.75% by 2010 to 20% by 2020 would be beneficial to the plaintiff in the long run.

[20] For the purpose of the fixed term loan facility the plaintiff had offered the first legal charge over the project land located in Indonesia, a debenture by way of fixed and floating charge for the assets of the plaintiff, debt service reserve account (DSRA), assignment of rights and benefits over the project and an irrevocable and unconditional personal guarantee from Boelio Muliadi.

[21] The plaintiff had initiated the acquisition of the land in Dumai from the Dumai Port authority to be subdivided and transferred to the plaintiff.

[22] However, after having accepted the LO dated 26 January 2007, the defendant had decided not to provide the fixed term loan facility to the plaintiff based on the ground of unfavourable market outlook for biodiesel (see p 72 of B1).

[23] The action of the defendant was not justifiable, wrong and bad in law as the plaintiff had embarked to fulfil the indicative terms and conditions set out by the defendant in the LO. Hence there was no way that the defendant could revoke the LO as there was already a legally binding contract between the plaintiff and the defendant.

[24] The plaintiff had written numerous letters to the defendant for the defendant to withdraw the revocation. It had also given its justification as to why the defendant ought to withdraw the said revocation. Other than the reasons stated above, the plaintiff had also informed the defendant of its

intention to take the plaintiff for listing on the alternative investment market ('AIM', London) and in the event the revocation was not withdrawn the loss the plaintiff would have to suffer would amount to USD60,000 per day. In addition, the plaintiff too would have to incur substantial sum of money for the following extension of:

(a) Biodiesel off-take agreements;

(b) Glycerine off-take agreements;

(c) CPO feedstock agreements;

(d) Jatropha feedstock supply agreement;

(e) sale and purchase agreement for acquisition of project land at Dumai; and

(f) turnkey contract with a consulting engineering firm.

(see pp 104–112, 113–115, 116–119, 123–124, 125–128, and 120–121 of B2)

[25] Vide its letter dated 31 December 2007 and 11 January 2008 the defendant had informed the plaintiff that it was reviewing the plaintiff's appeal (see pp 73–74 of B1). As the defendant had taken a long time to give the feedback to the plaintiff on the plaintiff's appeal, on 11 April 2008 the plaintiff had written to the defendant to inform the defendant that the plaintiff was agreeable to relocate the project site back to Batam Island and the capacity of 400,000 tonnes pa to be maintained.

[26] However, there was no reply from the defendant. The plaintiff then through its solicitors had caused a notice to be issued to the defendant notifying the defendant that the plaintiff had performed its part of the bargain and/or acted upon the indicative terms and conditions of the LO. In the same notice, the plaintiff had given notice to the defendant to disburse the term loan sum of USD40m. The defendant had responded through its solicitors vide its letters dated 14 May 2008, 19 September 2008 and 10 February 2009 respectively (see pp 75–76, 79–80 and 84 of B1).

[27] Based on the above facts the plaintiff claimed that the defendant had wrongfully terminated or revoked the LO dated 18 January 2007. Therefore the defendant had breached the terms and conditions stated in the LO, in that, it had:

(a) failed to respond to eight letters sent by the plaintiff to the defendant;

(b) revoked the LO without considering the financial and economic implication faced by the plaintiff;

(c) unilaterally, prematurely and without justification revoked the LO;

(d) failed to make proper inquiry and investigation pertaining to the viability of the project;

(e) failed to reconsider the plaintiff's intention to shift back the location of the project to its original site at Batam Island; and

(f) failed to consider that there was a valid and binding contract between both the plaintiff and the defendant and the existence of the fiduciary duty.

[28] As a result of the defendant's failure to provide the facility, the plaintiff could not proceed with the business plan and/or execute the necessary agreements stated at para 22 herein with the third parties. The plaintiff too had to compensate the third parties, which were involved with the project, as it could not honour the promise made to the third parties. Further, the long delay caused by the defendant to convey to the plaintiff its decision pertaining to the fixed term loan and the increase in the costs of the project had rendered the project no longer executable.

[29] The plaintiff claimed for all loss suffered by it as a result of the wrongful termination or revocation of the LO including the equity injected into the plaintiff company amounting to INR8,973,871,120 which is approximately USD987,387.11 as well as the sum of USD5.3m transferred to the account KP Biotechnologies Sdn Bhd.

[30] Therefore, the plaintiff prayed for the prayers set out in the ASOC to be allowed by this court.

The defendant's case

[31] The defendant called three witnesses. They were Wan Noorazli Maula Wan Suleiman, the assistant manager of the Legal Department ('DW1'), Muhamad Fairuz bin Ismail, the assistant vice president of Credit Audit and Review Department ('DW2') and M Ayatollah Khomeini bin Ab Rahman, a senior research officer from Palm Oil Development Board Malaysia ('DW3'). The gist of the defendant's case is as follows.

[32] The defendant did not dispute that there was an application made by the plaintiff for the facility for purpose of the construction of the project at Batam Island, Indonesia and the fact that the LO was issued to the plaintiff containing the indicative terms and conditions relating to the facility applied for by the plaintiff. However, the defendant had referred to the various letters issued by the plaintiff to show that the plaintiff was the party which was responsible to unilaterally vary and/or alter the indicative terms and conditions

which were approved and agreed earlier by the defendant. This could be gauged from the various letters issued by the plaintiff and the defendant as follows:

(a) the letter of offer dated 8 January 2007 (pp 51–58 of B1);

(b) the plaintiff's letter dated 30 March 2007 (pp 102–103 of B2);

(c) the defendant's letter to plaintiff dated 28 September 2007 (p 72 of B1);

(d) the plaintiff's letter dated 16 November 2007 (pp 113–115 of B2);

(e) the plaintiff's letter dated 10 December 2007 (pp 116–119 of B2);

(f) the plaintiff's letter dated 18 December 2007 (pp 120–121 of B2);

(g) the plaintiff's letter dated 2 January 2008 (p 122 of B2);

(h) the plaintiff's letter dated 14 January 2008 (pp 123–124 of B2); and

(i) the plaintiff's letter dated 3 March 2008 (pp 125–128 of B2).

[33] A perusal of these letters would demonstrate that the plaintiff had unilaterally changed the project location from Batam Island to Dumai Port. Beside that the plaintiff too had unilaterally decided to increase the capacity of the project from the 300,000 meter ton per annum agreed earlier to 400,000 meter ton per annum. The defendant claimed that by doing so the plaintiff had deviated from the indicative terms and conditions agreed upon earlier vide the LO which was duly accepted by the plaintiff. In its letter dated 3 March 2008, the plaintiff had unilaterally decided to purchase a piece of land in Dumai Port for the purpose of the project (p 126 of B2).

[34] After the defendant had issued the letter of termination/revocation dated 28 September 2007 the plaintiff had sent a few letters to the defendant urging the defendant to withdraw its letter of termination/revocation and to continue to provide the facility with the location changed and the plant capacity increased. The reason cited by the plaintiff was that it had entered into a sale and purchase agreement for the purpose of acquisition of a piece of land located in Dumai Port for the purpose of the project (see pp 104–108 of B2). The defendant had informed the plaintiff that it had no intention to retract the letter of revocation and termination and that the said revocation and stood and remained effective (see pp 75–76 of B1). After the plaintiff realised that the defendant had not barged from its earlier stand the plaintiff then decided to revert to its original intention to have the project constructed in Batam Island but still maintained its intention to have the plant capacity increased from 300,000 mt to 400,000 meter ton per annum (see pp 142–143 of B2).

[35] By a letter dated 24 April 2008 the plaintiff had through its solicitors Messrs Gerald Samuel & Assoc demanded that the defendant to fully, completely and unreservedly comply with the terms and conditions of the LO

and release the sum of USD42m pursuant to the said facility within seven days from the date of letter, failing which the plaintiff would commence legal proceedings against the defendant to seek for the specific performance of contract and/or claim damages (pp 130–133 of B2).

[36] The above letter was responded by the defendant vide its letter dated 15 May 2008 notifying the plaintiff that it had validly and lawfully revoked the LO vide its letter dated 28 September 2007 based on the grounds stated therein. Therefore, there was no valid or enforceable offer from the defendant to the plaintiff to be enforced. The defendant contended that the offer was specifically for the part-financing of the development and construction of the project in Batam Island with 300,000 meter ton per annum and that the said LO was subject to formalisation of documentation.

[37] The details of the reasons advanced by the defendant were as stated in the said letter (see pp 73–74 of B1). The same was reiterated by the defendant through its solicitors' letters dated 14 May 2008 and 29 July 2008 respectively (see pp 75–76 and 77–78 of B1). This was followed by the defendant's letter dated 19 September 2008 where the defendant maintained its stand that the revocation of the LO was fair, reasonable and justified (see pp 79–80 of B1).

[38] Despite accepting the position that the LO stood terminated, the plaintiff continued to appeal to the defendant to reconsider the plaintiff's request for reinstatement of the facility. By its letter, dated 7 November 2008 the defendant had written to the plaintiff to request for some documents to be furnished to enable the defendant to reconsider if it was agreeable to provide a new facility to the plaintiff (see pp 81–84 of B1). Instead of responding the defendant's request to furnish the necessary document for the defendant's perusal, the plaintiff proceeded to commence this action against the defendant.

[39] As the plaintiff had committed fundamental breaches of the terms of the LO the defendant was entitled to revoke the LO dated 8 January 2007 vide its letter dated 28 September 2008 (see p 72 of B1). Further the defendant maintained it had the discretion under cl 29 of the LO to revoke the LO if in subsequent opinion, the granting of the facility was prejudicial to its interest.

[40] The defendant realised that the plaintiff had procured the approval of the LO by way of false representation. Therefore, the LO was procured by way of misrepresentation, be it fraudulent and/or negligent and/or innocent. The false representation made by the plaintiff were as follows.

At the time of submission of application

(a) the plaintiff had informed the defendant it was already in existence even at the time the plaintiff submitted its application to the defendant for approval (see p 3 of B2);

(b) the cost of the project was USD57m and out of which the sum of USD13m would be absorbed by its parent company and an additional sum of USD1.5m. The balance would be USD42.5m;

(c) the plaintiff shall be owned, control and managed in all aspects by a Malaysian or persons of Malaysian origin who were well versed in the specific area such as agriculture and manufacturing;

(d) the plaintiff was ready to carry out the business development of biodiesel activity. All ground work pertaining to personnel both managerial and production sectors had already been done;

(e) only task which was outstanding was the acquisition of the Project site through purchase which was at its final stage, placement orders for plants and machinery and securing the financing;

(f) the proposed project site would be in Batam Island with access to deep water berth to take in 50,000 DWT vessels for export of biodiesel to Europe, Australia and North Asia; and

(g) the initial paid up capital of the plaintiff amounting to USD2m would be increased progressively to USD13m.

The period before the issuance of the LO

(h) the purported incorporation of the plaintiff was 17 November 2006;

(i) purported paid up capital was USD7m and to be increased to USD12m;

(j) the purported shareholders fund of the plaintiff was USD7m as at 27 November 2006;

(k) there was a purported joint venture between Overseas & General Ltd ('OGL') holding 51% and Megapacific Investment Ltd holding 49% of the shares;

(l) the facility was only to part finance the development and construction of the plant to be based on turnkey contract with local contractor known as KP Biotechnologies Sdn Bhd ('KPB') under the Konpro's Group of Companies ('Konpro') based in Petaling Jaya, Selangor. Konpro was also involved in similar contract in Kuantan;

(m) the repayment of the facility would be from the operation of the plant;

(n) the security for the said facility would be the legal charge together with corporate guarantee from the plaintiff's shareholders and personal guarantee from plaintiff's director, Irjanta Ongko;

(o) the biodiesel market was purportedly favourable;

(p) the 4.5–5 hectares project site in Batam Island was suitable with ready basic infrastructures, good transportation system and wharf and jetty facility for import and export purposes;

(q) a letter of consent for foreign injection of capital dated 19 September 2006 had been obtained from the relevant authority and its amendment approved on 9 October 2006;

(r) the plaintiff and KBP had purportedly executed the turnkey contract dated 12 December 2006 for the purpose of the project; and

(s) feedstock supply agreements had purportedly been executed between the plaintiff and PT Berkah Sawit Sumatera and PT Smart Tbk dated 15 December 2006 and 1 January 2007 respectively for the purpose of the project.

[41] The plaintiff's representation as mentioned above including the various false addresses given to the defendant such as Rumah Sakit Gleneagles Medan, Jl Listrik No 2A Medan-20211 Indonesia ('Address 1'); Jl Aksara No 2 Medan,

Indonesia ('Address 2'), Gedung Graha Niagal, Lt 5 Jl Putri Hijau No 20, Medan 20115, Indonesia ('Address 3'); Jl Raden Saleh 18D-G, Jakarta Pusat 10430 Indonesia ('Address 4'); and Jl Pukat Harimau (Komp Buana Plaza LT, IV) RT 000 RW-0000 Bantan Timur, Medan Tembung, Kotamadya Medan, Indonesia ('Address 5') had induced the defendant in issuing the LO.

[42] A company search conducted by the defendant's solicitors, Messrs Ram Reza & Muhammad around 21 January 2010 disclosed the following documents:

(a) the deed of establishment No 25 dated 17 November 2006 made before the notary (see pp 11–47 of B1);

(b) the plaintiff's Tax Payer Registration Number No 02.501.943.1-113.000 in reference to *nomor pokok wajib pajak* in Indonesia was obtained during incorporation (see p 85 of B1); and

(c) the decision of the Minister of Law and Human Rights No W2-00050 HT 0101-TH 2007 pertaining to the legalisation of the plaintiff's deed of establishment dated 19 January 2007 (see p 86 of B1).

[43] A perusal of the above mentioned documents showed that:

(a) the person who notarised the necessary documents for the purpose of its incorporation was one Susan Widjaja (see pp 11 and 85–86 of B1);

(b) as at 17 November 2006 the shareholders of the plaintiff was one Boelio Muliadi and Sandra Kirana Suhendra (see p 13 of B1);

(c) the only director of the plaintiff was Sandra Kirana Suhendra with Boelio Muliadi acting as president commissioner (see p 44–45 B1);

(d) the plaintiff's paid up capital was only Rp10,000,000 which was approximately RM2,800 only (see p 13 of B1);

(e) the plaintiff's *nomor pokok wajib pajak* notarised by the notary was NPWP 02.501.943.1-113.000 (see p 85 of B1); and

(f) the plaintiff was legally incorporated on 19 January 2007 (see p 86 of B1);

[44] Based on the above the defendant discovered that the plaintiff had made various representations for the purpose of the application for the facility especially with regard to its shareholding structure, composition of board of directors and the particulars of the plaintiff, which were false.

The plaintiff's addresses

[45] The above discovery had led the defendant to conduct further research

on the plaintiff including visits to the addresses 1–5 mentioned earlier by DW1 on 18 December 2011. Address 1 was operating as a hospital known as 'Rumah Sakit Colombia Asia' (see pp 331–332 of B3 and pp 87–88 of B1) with the plaintiff's office nowhere to be located.

[46] The visit to Address 5 by DW1 showed that it was a shopping complex known as 'Buana Plaza' (see pp 348–349 of B3). There was no reference to indicate that it was the address of the plaintiff. At Address 2, DW1 discovered an open parking lot with a banner hanging on the trees with the address stated as Jl Aksara No 2 Medan Indonesia (see pp 333–339 of B3).

[47] DW1 continued with his mission on 19 December 2011 where he had gone to the Medan Branch Tax Registration Department at Gedung Graha Niaga 2, Lt 5 Jl Putri Hijau No 20 Medan 20115, Indonesia to conduct a search on the plaintiff (see pp 319–321 of B3). DW1 was given slip No *080* and subsequent to that he was given a copy of the 'Data Master File Wajib Pajak' (see pp 319 and 350–351 of B3). This document indicated that the investors and/or its shareholders and members of the board of directors were all strictly Indonesians. DW1 had also realised that Address 3 was situated at the building beside the Medan Branch Tax Registration Department. Photographs of the site were taken by DW1 (see pp 340–341 of B3). DW1's visit to the said address showed that there was no office with the plaintiff's name displayed on it.

[48] The next day on 20 December 2011, DW1 took along ride to Dumai Port. DW1 arrived at the office of PT (Persero) Pelabuhan, Indonesia 1 Cabang Dumai ('Dumai Port Authority'). At the said destination, DW1 was given a visitor's access card to enter the office (see p 375 of B3). At the said office, DW1 met one officer known as Hendri Bachtiar and discovered, that the project site stated at p 83 of B3 was owned by Dumai Port Authority did not match with the master plan of Dumai Port Authority. The tenants of the area surrounding inclusive of the proposed site were PT Permata Hijau Sawit and PT IPO Sumatera. The proposed project site did not have the plaintiff's sign board and/or any form of indication that it belonged to the plaintiff (see pp 376–411 of B3).

[49] On 21 December 2011, DW1 proceeded to Kabil Industrial Estate Area in Batam. There were two industrial sites situated in the said area, Kawasan Industri Terpadu Kabil and Kantor Pelabuhan Laut Pos Terminal CPO Kabil respectively which was visited by DW1. DW1 took pictures of two big sign boards with the names of the relevant companies listed on it at Kawasan Industri Terpadu Kabil. The plaintiff's name was not stated on the said signboards (see pp 352–355 of B3 — exh D16). DW1 was prohibited

from entering Kawasan Industri Terpadu Kabil. DW1 did the same for Kantor Pelabuhan Laut Pos Terminal CPO Kabil (see pp 363–372 of B3) and discovered the same thing at this site

[50] DW1's next tour was to Batam Indonesia Free Zone Authority (see pp 373–374 of B3). At this place, DW1 obtained a copy of 'Batam Industrial Estate Profile' (see pp 273–278 of B3) and the 'Development Progress of Batam'. None of these two relate to the plaintiff.

[51] DW1's tour continued on 22 December 2011 to Address 4 with two rows of offices, which were run down with suspicious people around him. He could not find any sign with the name of the plaintiff (see pp 342–344 of B3). DW1 feared for his safety and concluded his tour by pretending to act like a tourist who was looking for souvenirs. However, he managed to take some shots of the place (see pp 345–347 of B3).

[52] DW1 concluded that from his investigation there was never any biodiesel project envisaged at the material times and everything was a sham. A police report was lodged by DW1 (see pp 144–147 of B2).

[53] In the course of the preparation of the documents for trial, DW1 had come across some transfer scripts issued by KP Biotechnologies Sdn Bhd (see pp 110–121 of B3) which DW1 believed was the contractor proposed by the plaintiff for the said project. A search was conducted at the Companies Security Commissions ('CCM') (see pp 322–327 of B3) revealed the following:

(a) on 7 October 2008, KP Biotechnologies Sdn Bhd had changed its name to 'Gabungan Ada Sdn Bhd';

(b) its registered address was within walking distance to the plaintiff's corporate office in Malaysia;

(c) Gabungan Ada Sdn Bhd had never submitted its account with CCM;

(d) Gabungan Ada Sdn Bhd was not in any way connected to Kompro Group as represented by the plaintiff to the defendant; and

(e) Gabungan Ada Sdn Bhd had been dissolved.

[54] On 9 March 2012, DW1 conducted a manual search on Gabungan Ada Sdn Bhd and discovered it never ran any business or operated any business before it was struck out by CCM (see exh 'D4' at p 412 of B3).

[55] The defendant claimed that the termination/revocation of the LO was justified due to the unfavourable market outlook for biodiesel at the material time and the defendant was concerned about the viability of the project (see

p 72 of B1). The decision was backed by a credit risk analysis report dated 7 August 2007 prepared by DW2, which disclosed that there would be serious risk in the plaintiff suffering losses and ultimately it would not be in a position to settle the amount financed by the plaintiff (see pp 122–124 of B3 — 'exh D5'). The Credit Risk Analysis Report had highlighted that the increase of the CPO prices to more than RM2,400 or USD704 per metric ton ('p/MT') would definitely affect the margin and probably register gross losses as biodiesel price at the time of the study hover around RM2,400–RM2,600 p/MT. As the plaintiff was not an integrated player, it has to source its supply from the market. As a result of the unfavourable market outlook, the defendant had to re-visit the financing to examine if at the material times the project was still viable.

[56] The plaintiff had made an assumption that the CPO price would be at USD600 p/MT and the selling price of the biodiesel would be USD720 p/MT. Based on the market condition as at 6 August 2007, the average CPO price had gone up to around USD760 p/MT, which was higher than the projected selling price of biodiesel at USD720 p/MT. Considering that, the plaintiff was not an integrated player in the industry as it had to source its supply from the open market and be subjected to the fluctuations of the price of the CPO, which was on an upward pattern. Hence, it was obvious to the defendant that the biodiesel market outlook was unfavourable making the project no longer viable.

[57] Therefore, the defendant claimed that it was justified in invoking cl 29 of the LO which gave the discretion to the defendant to revoke the LO if the granting of the facility was prejudicial to the defendant's interest. Further under this clause the defendant shall not in any way be liable for damages or loss howsoever suffered by the plaintiff as a result of the revocation/termination of the LO.

BURDEN OF PROOF

[58] It is trite that the person who asserts the existence of certain facts must prove those facts exist (see s 101(1) of the Evidence Act 1950). In the Malaysian case of *Selvaduray v Chinniah* [1939] 1 MLJ 253, the court held that the onus of proof was on the plaintiff to prove his case and that, if the position at the conclusion of the trial being exactly even, the plaintiff had not discharged the onus which was on him and his action must fail.

[59] In the case of *Chong Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31, the Federal Court held that where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as the plaintiff.

[60] In *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 Winslow J held at p 244 as follows:

> I accordingly find that the plaintiffs have not discharged the burden of proving a case against the defendant in the first placed.
>
> No burden accordingly shifts to the defendant ... *the defendant would not have to disprove something which has not been proved against him*. (Emphasis added.)

[61] The principles within which this court should be guided in disposing a case after a full trial had been laid down in a number of authorities. In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 for instant His Lordship Chang Ming Tat FC said:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[62] In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at pp 116–117 which was approved by the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 the court held:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence of a witness. *He must when deciding whether to accept or reject the evidence of a witness, test it against relevant criteria*. Thus, he must take into account the presence or absence of a motive that a witness may have in giving his evidence. *If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against probabilities of the case*. A trier of fact who makes findings based purely upon demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: *the approach to judicial appreciation of evidence is the same*. (Emphasis added.)

POINTS RAISED BY THE RESPECTIVE PARTY

For the defendant

[63] Learned counsel for the defendant had advanced, amongst other things, the following arguments:

(a) the plaintiff through PW1 had no mandate to proceed and/or embark into the venture and/or complete it. The facts pertaining to the stand taken by the board of directors of OGL ('BOD') and its major shareholders with regard to the viability of the project, especially with the project site relocated at Dumai Port and the capacity increased from 300,000 meter ton per annum to 400,000 meter ton per annum were

well within the knowledge of PW1 from the outset. Even the shareholders of OGL had been advised by its BOD and PW1 that the project was not viable due to unfavourable market outlook of biodiesel. In fact, the shareholders of OGL had voted down the resolutions for the plaintiff to venture into the project and to enter the facility agreement with the defendant. However, PW1 had suppressed this information from the defendant and continued to appeal to the defendant to reconsider its request even after the revocation/termination of the LO. Thus giving the impression to the defendant that the plaintiff had already obtained the necessary mandate to venture into the project and the project was still viable;

(b) the 'Credit Risk Analysis Report' conducted by the defendant disclosed that the project was not viable due to unfavourable market outlook. The BOD of OGL and its shareholders had voted down the two resolutions submitted for approval due to unfavourable market outlook. Therefore the decision of the defendant to revoke the LO was consistent with the position taken by OGL and its major shareholders;

(c) the facility which was granted to the plaintiff was based on the 'Financial Study' premised on the project being located at Batam Island with its capacity set at 300,000 meter ton per annum. Therefore the LO was issued based on the viability of the project being located at Batam Island and capacity of the plant set at 300,00 meter ton per annum. Therefore plaintiff ought not to unilaterally change the material terms of the project as it pleased;

(d) the plaintiff's departure from the clear terms spelt out in the LO especially with regard to the change of the project location from Batam Island to Dumai Port and the increase in the capacity of the plant from 300,000 meter ton per annum to 400,000 meter ton per annum amounted to the refusal of the plaintiff to honour its part of the bargain. This clearly showed the plaintiff no longer wished to abide by the terms contained in the LO. Therefore the LO had come to an end due to the plaintiff's counter offer. Hence the plaintiff could no longer claim any rights under the LO;

(e) based on the series of correspondence as discussed earlier in para 40 the defendant's solicitors had clarified the position that the letter of revocation remained effective due to the plaintiff's own unilateral conduct of changing, varying and/or altering the terms of the LO dated 19 September 2008 (see pp 75–80 of B1);

(f) the plaintiff had appeared to have accepted the position that the revocation remained effective. However, the plaintiff proceeded to appeal to the defendant to reinstate the facility. In order to enable the defendant to consider the plaintiff's request the defendant had asked the

plaintiff to furnish specific documents for the defendant's perusal, including proof of its acquisition of the project land in Batam Island. Instead of furnishing, the information required by the defendant the plaintiff proceeded to make unwarranted allegations against the defendant and then commenced this action in court;

(g) there was no common rule that it was a condition precedent that a notice must be first given correctly, specifying the grounds on which the power was being exercised. A party is entitled to justify the revocation/termination if the object facts which justify the taking of the step existed at the material times even though that party at the time the steps was taken did not know of the facts;

(h) the defendant had rightfully exercised its discretion under cl 29 of the LO. This is supported by the 'Credit Risk Analysis Report' prepared by the defendant, which showed that the average CPO price was higher than the assumed biodiesel selling price. As the plaintiff was not an integrated player in the biodiesel field to source its supply from the open market the plaintiff had to subject, itself to the fluctuations of the CPO price on the upward trend. Due to these reasons, the project was not viable; and

(i) the plaintiff having accepted the revocation as valid would be estopped to challenge the same. The plaintiff had accepted the revocation and appealed to the defendant to reconsider. The plaintiff had blatantly disregarded the defendant's request for further documents. Instead, it started hurling accusations against the defendant and commenced this action against the defendant.

For the plaintiff

[64] Learned counsel for the plaintiff submitted the following arguments:

(a) the defendant had made an offer to the plaintiff pursuant to the LO and the plaintiff had accepted the LO. Therefore, the contract was valid and legally binding between the plaintiff and the defendant;

(b) the acceptance by the plaintiff by performing the terms and conditions stipulated in the LO proved that the proposal by the defendant had been accepted. Therefore, the plaintiff had satisfied s 8 of the Contracts Act 1950;

(c) the revocation was made after the acceptance and/or after the plaintiff had performed the terms and conditions stated in the LO. Pursuant to the acceptance, the plaintiff had also increased its paid up capital to USD7 and made arrangements to further increase it to USD12m and execute all the necessary agreements for the purpose of the project. Therefore, it was too late for the defendant to back out;

(d) the letter of revocation/termination was invalid and/or ineffective in law, as there was delay in providing the plaintiff with the necessary feedback. Hence it was too late for the defendant to revoke the LO after the plaintiff had embarked and/or performed the terms and conditions stipulated in the LO;

(e) the defendant had not provided any explanation for the revocation/termination. It was unclear, unequivocal and had only stated it was due to 'unfavourable market outlook for Biodiesel'. Therefore, the revocation was made without stating sufficient cause. The decision to revoke the LO was also tainted with elements of bad faith and without proper due diligence;

(f) cl 29 which prohibited the plaintiff from pursuing its remedies allowed by the law such as claiming damages for breach of contract was void as it contained uncertain terms and therefore bad in law as this is prohibited by s 30 of the Contracts Act 1950;

(g) the plaintiff did not change the terms of the LO. It merely made recommendations to review the terms and the defendant was entitled to accept or reject those terms and/or insist on strict compliance of the terms in the LO. The defendant contradicted itself in contending that the revocation was valid and yet at the same time was relying on s 40 of the Contracts Act 1950;

(h) even if there was a breach, which the plaintiff vehemently denied, the breach had been remedied vide the plaintiff's letter dated 11 April 2008 where the plaintiff had agreed to comply with the earlier approval that the project site remained in Batam Island and communicated the same to the defendant;

(i) the plaintiff could not be estopped in challenging the revocation/termination because there was an appeal. This was not an endorsement of the revocation/termination but continued efforts to ensure continuance of a concluded contract;

(j) the plaintiff's breach was remedied when the plaintiff agreed to relocate the project site back to Batam Island despite maintaining the capacity of the plant at 400,000 meter ton per annum instead of 300,000 meter ton per annum. Even if there was a departure it only amounted to breaches of the terms and conditions in the LO and they were not fundamental breaches of condition but merely warranties;

(k) the facts disclosed that there were no communications between the plaintiff and the defendant which had induced the defendant in issuing the LO. The defendant ought to have protested at the earliest possible opportunity or raise the same in its communications. The conduct of the defendant was merely an afterthought. The defendant had not

proved by way of evidence that there were misrepresentations. The defendant's conduct was tainted with mala fide;

(l) the defendant's recovery process is an afterthought as it was conducted after the revocation;

(m) the defendant ought to have conducted its due diligence prior to the issuance of the LO to find out more about the plaintiff and the project the plaintiff was embarking on. The plaintiff had established that it was entitled to damages due to the defendant's breach of the LO; and

(n) no weight to be given to the evidence of DW3, as he is not the expert in the field of production of biodiesel industry in Indonesia. With regard to DW2, the plaintiff claimed that the credit risk analysis report was merely based on DW2's assumption only and unsupported by credible evidence.

FINDINGS

[65] At the outset of the trial learned counsel of the plaintiff had informed this court it would not be pursuing its claim for specific performance.

[66] Having evaluated the evidence of the plaintiff and the defendant both testimonial as well as documentary, having perused all the relevant authorities cited before me and having read and heard the submissions of the respective learned counsels these are my findings.

Whether there was mandate for project/mandate to enter into agreement

[67] The major shareholder of the plaintiff was Overseas & General Ltd ('OGL'). In order to fulfil the requirement of the Australian Stock Exchange and the Singapore Stock Exchange listing rules, around May 2007, the board of directors of OGL which owned 51% shares in the plaintiff had called for an extraordinary general meeting to seek the shareholders' consideration and approval to venture into this investment. Two resolutions were proposed for the shareholders to consider and approved. The first resolution was to seek the mandate to enter into a strategic alliance with Megapacific Investment Ltd for the plaintiff to carry on with the biodiesel project in Dumai Port with plant capacity increased from 300,000 meter ton per annum to 400,000 meter ton per annum. Whilst the second resolution was to seek the authorisation to enter into the facility agreement with the defendant to part-finance the project.

[68] According to PW1, these two resolutions were first proposed on 31 May 2007. Based on the advice given by the board of directors of OGL, the shareholders of OGL voted down both these resolutions on the ground of unfavourable biodiesel market. OGL then subsequently published this

information in the public announcements to the Australian and Singapore Stock Exchange. PW1 had testified that the board of directors of OGL and PW1 had informed the shareholders that there was change in the circumstances and the board could not in good conscience advise the shareholders to approve these two resolutions. The announcement to the Australian and Singapore Stock Exchange was signed off by PW1 on behalf of the board.

[69] PW1 had also admitted in cross-examination that as at the date of the revocation/termination the board members of OGL and its shareholders did not approve the facility for the same reason given by the defendant in the revocation/termination letter ie 'due to unfavourable market outlook of biodiesel'.

[70] The facts pertaining to the decisions taken by the board of directors of OGL and its shareholders which voted down both these resolutions on the ground of unfavourable biodiesel market were well within the knowledge of PW1 from the very beginning but the plaintiff had suppressed this crucial information from the defendant. Despite the issuance of the revocation/termination of the LO dated 28 September 2007, the plaintiff had instead proceeded to appeal to the defendant to consider its appeal indicating to the defendant that the project was still viable and it needed the facility approved. Thus portraying the misleading impression that it had already obtained the necessary mandate to proceed with the project with its venue changed from Bantam Island to Dumai Port and capacity increased to 400,000 meter ton per annum. PW1 had also confirmed to the court that the plaintiff could not embark to venture into this project without the approval of the OGL's shareholders.

[71] It is obvious from the above as at the date of the revocation/termination, PW1 did not have the proper mandate to venture into the project and/or authority to enter into the facility agreement with the defendant. PW1 had testified that the plaintiff could not proceed with the project and/or enter into the facility agreement with the defendant.

(notes of proceedings ('NP') dated 19 June 2013 at pp 25–26 and 31 and NP at pp 35–36, and 39; NP dated 18 June 2013 at pp 32–34)

Whether there was a valid and binding contract

[72] The plaintiff claimed that the LO was accepted by the plaintiff once the plaintiff had placed its signature on the acceptance column as shown at p 8 of the LO (pp 1–8 of B1). This according to the plaintiff constituted an absolute and unqualified acceptance. Further the plaintiff alleged that it had performed

the terms and conditions of the LO. Therefore the plaintiff could rely on the provision of s 8 of the Contracts Act 1950 which, amongst others, stated that the performance of conditions precedent constitute an absolute and an unqualified acceptance. The plaintiff attempted to show that it could rely on the provision of s 8 of the Contracts Act 1950 as it had embarked on the performance of the LO by executing the following documents:

(a) causing its paid-up capital to be increased to USD7m and made arrangements to for further increase its share capital to USD12m before final drawdown;

(b) executed biodiesel off-take agreement

(c) executed a Glycerine biodiesel off-take agreement;

(d) executed CPO feedstock supply agreement;

(e) executed Jathropha feedstock supply agreement;

(f) executed a turnkey contract with a consulting engineering firm; and

(g) executed a technology agreement with their technology partners.

[73] Having followed the evidence of the plaintiff both testimonial and documentary, I found that the plaintiff had failed to establish its pleaded case as it had failed to support its claim that it had performed the terms and conditions of the LO with credible evidence. I observed that apart from mere statements by the plaintiff's witnesses, there was no evidence produced in this court to support these bare assertions.

[74] Based on the plaintiff's own undisputed document which was produced in court, the plaintiff paid up capital was only Rp10,000,000 which is equivalent to about RM2,800. Despite having called four witnesses to the stand none of these witnesses was able to show the fact that the plaintiff had performed the terms and conditions of the LO as claimed. The plaintiff's contention that it had performed the terms and conditions of the LO were bare allegations unsupported by credible evidence. Therefore this point of contention relied by the plaintiff ought to be dismissed by this court.

Whether there were breaches of contract on the part of the plaintiff

[75] By its letter dated 30 March 2007 (see pp 102 to 103 of B2) the plaintiff had conveyed to the defendant of its decisions to change the location of the project site from Batam Island to Dumai Port and to increase the capacity of the project from 300,000 meter ton per annum to 400,000 meter ton per annum. In view of the above variation and/or alteration of the material terms and conditions of the LO, the defendant had called for a 'Credit Risk Analysis Report' to be prepared by DW2 to enable the defendant to re-evaluate and

reassess the whole facility and decide whether the project was viable for the defendant to part-financed. The finding of the said report was that the project to be embarked by the plaintiff and to be part-financed by the defendant was not viable due to unfavourable biodiesel market outlook. Based on this report the defendant then revoked the LO pursuant to a letter dated 28 September 2007.

[76] The LO had clearly spelt out the purpose for which the project was to be embarked by the plaintiff which was to be part-financed by the defendant was to construct a biodiesel plant with the capacity of 300,000 meter ton per annum and for this project to be located in Batam Island. Further, the facility which was granted to the plaintiff was based on the financial study conducted by the plaintiff on the viability of the project site being located in Batam Island and with its capacity set at 300,000 meter ton per annum. The financial study which formed part of the document attached to the application for the facility sent to the defendant was only relevant for that purpose. Hence, the approval of the facility was based on the financial study prepared by the plaintiff with the view of having the project located in Batam Island. That being the case the plaintiff ought not to unilaterally change the project site as it pleased.

[77] The plaintiff's departure from the clear terms of the LO tantamount to a refusal on the part of the plaintiff to honour and fulfil the terms and conditions stated in the LO. Hence the plaintiff had refused to perform its part of the bargain and/or had disabled itself from performing the promise in entirety as stated in the LO. Based on the factual matrix of this case I am of the view that the defendant was entitled to rely on s 40 of the Contracts Act 1950. Hence the defendant was justified in revoking the LO in the manner that was done in this case (see p 72 of B1). The plaintiff was not able to show by way of credible evidence that the defendant had signified, by words or conduct, its acquiescence to continue with the contract.

[78] I refer to the Court of Appeal case of *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420 ; [2006] 4 CLJ 267 quoted by learned counsel for the defendant where there were exchanges of letters between the plaintiff and the defendant which stretched over a period of 18 months. The plaintiff in that case requested for time to consider the new term that was being sought to be introduced into the existing contract which was agreed to by the defendant. The court held 'the act of the defendant in introducing a new term into the contract and insisting on its compliance was a clear breach of contract' and further the court went on to say 'Also, what the defendant demanded performance of was a new contract, having thrown overboard the old contract'.

[79] His Lordship Mohamad Azmi SCJ had said in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 ; [1985] 1 CLJ 541 such conduct

clearly showed that there was 'an absolute refusal on the part of the defendant to be bound by the original contract' and further the action of the defendant is — as stated by the learned judge in that case — 'such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions'.

[80] In the above scenario, the court held that plaintiff had a choice to 'either treat the contract as at an end or elect to perform a new contract'. This position is in harmony with the reading of the provision of s 40 of the Contracts Act 1950. The court had also ruled that, 'You must either affirm the whole contract or rescind the whole contract: you cannot approbate and reprobate by affirming part of it and disaffirming the rest — that would be making a new contract'.

[81] The letter dated 30 March 2007 from the plaintiff whereby it introduced new terms and insisted in its compliance clearly showed that the plaintiff no longer wished to abide by those terms contained in the LO. The LO had come to an end due to the plaintiff's counter offer. Hence the plaintiff could no longer claim any rights under the LO.

Whether the plaintiff were making recommendations

[82] It was further submitted by learned counsel for the plaintiff in its 30 March 2007 letter, the plaintiff was merely making recommendations to the defendant to consider. The defendant had the option whether to accept or reject the proposal. Learned counsel further submitted s 40 of the Contracts Act 1950 did not apply to this scenario. If at all there were breaches these breaches were merely breaches of warranties and not fundamental breaches of the terms and condition of the LO.

[83] A perusal of the said letter would show that the plaintiff had in fact unilaterally deviated from the original terms and conditions of the LO and it was not merely a recommendation as claimed by the plaintiff. Perhaps this court ought to look at the language used in the said letter to see the clear meaning and intent of the said letter as follows:

> CHANGE OF LOCATION AND PLANT CAPACITY OF BIODIESEL PROJECT
>
> With reference to the above-mentioned matter, we wish to advise that PT Vision Renewable Fuels (PT Vision)'s Biodiesel Project ('the Project') *will be located in Port of Dumai, Sumatra, instead of Batam Island in Indonesia.*
>
> ...
>
> We are also pleased to advise that *we have also decided to upgrade our plant capacity to 400,000 tpa instead of 300,000 tm pa ...*

> We trust the above explanations are helpful in understanding the rationale for *our decisions to change the plant location from Bantam to Dumai, and for upgrading our plant capacity to 400,000 tonnes …*
>
> (Emphasis added.)

[84] The clear words of the said letter did not show that the plaintiff was making recommendations to the defendant and that the defendant was given a choice whether to accept or reject those terms. Therefore, with these facts before me I am satisfied that s 40 of the Contracts Act 1950 and the principle of counter offer clearly apply to the case at hand. It was absurd for the plaintiff to argue that the contents of the said letter were only recommendations made to the defendant. I am of the view that the decision of the plaintiff to change the location of the project and to increase its capacity were fundamental breaches of the terms and condition of the LO and not merely breaches of warranties as suggested. This was because the entire LO was premised upon the project location having been located in Bantam Island and the plant capacity was 300,000 meter ton per annum. This was precisely the purpose of the financing.

[85] However, pursuant to the plaintiff's letter dated 11 April 2008 it had decided to relocate its project site back to Batam Island. By its letter dated 14 May 2008 and 29 July 2008 the defendant's solicitors had clarified the position that the letter of revocation remained effective due to the plaintiff's own unilateral conduct of changing, varying and/or altering the material terms and conditions of the LO. The same was echoed by the defendant vide its letter dated 19 September 2008 (pp 75–80 of B1).

[86] It was the defendant's contention that from the correspondences, the plaintiff had appeared to have accepted the position that the revocation remained effective. However, the plaintiff proceeded to appeal to the defendant to reinstate the facility for the purpose of the project. In order to enable the defendant to consider the plaintiff's request on 7 November 2008, the defendant had requested the plaintiff to furnish specific documents for the defendant's perusal. Instead of furnishing, the information required by the defendant the plaintiff proceeded to make unwarranted allegations against the defendant. The defendant had also requested the plaintiff to disclose some documentary evidence to prove its acquisition of the project land in Batam Island and this too was not forthcoming. The plaintiff then commenced this action in court. Based on this the plaintiff is estopped from challenging the revocation/termination.

No explanation given for the revocation/termination of the LO

[87] The plaintiff contended that the defendant had failed to explain to the plaintiff the reason for the revocation of the LO and that it merely cited 'unfavourable market outlook' as the basis of the revocation. The defendant on the other hand cited the case of *Retail Equity Pty Ltd & Ors v Custom Credit Corporation Ltd & Ors* [1990-1991] 4 ACSR 23 and submitted that there was no common rule that it was a condition precedent that a notice must be first given correctly specifying the grounds of which the power was being exercised. A party is entitled to justify the revocation/termination if the object facts which justify the taking of the step existed at the material times even though that party at the time the steps was taken did not know of the facts.

Whether the revocation/termination Void

Whether parties could contract out of the Contracts Act 1950

[88] The plaintiff alleged that cl 29 prohibited the plaintiff from pursuing its remedies allowed by the law such as damages for breach of contract in the event the LO was rejected. Therefore, cl 29 was void which rendered the revocation of the LO unlawful. Further, cl 29 contained uncertain terms and therefore bad in law under s 30 of the Contracts Act 1950. This court is of the view that the plaintiff had agreed to the said term, in that, giving the discretion to the defendant to revoke the LO if in the subsequent opinion, the defendant found that the granting of the facility is prejudicial to the defendant's interest. In such circumstances the defendant shall not be liable for any damages or loss howsoever suffered by the plaintiff or any other person as a consequence of the defendant revoking the LO.

[89] Having agreed to this term it is not opened to the plaintiff to dispute the same subsequently. Even the plaintiff's material witness who executed the acceptance on behalf of the plaintiff, PW1, testified that he fully understood the contents of the LO before the same was signed by him. Therefore, the plaintiff was acquainted with the clear words of cl 29 and its implication. I think it was too late for the plaintiff to resile from the same (see NP dated 19 July 2013 at p 44).

[90] It had been held by His Lordship Justice Arifin Zakaria (as His Lordship then was) in the case of *Malayan Banking Berhad v Mawai Products Sdn Bhd (In Receivership) & 3 Ors* [1994] MLJU 327; [1995] 1 BLJ 43 cited by learned counsel for the defendant, 'It is settled that the parties to a contract are free to contract out of ss 92 and 94 of the Act. See *Ooi Boon Leong & Ors v Citibank & Ors* [1984] 1 MLJ 222; *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & 3 Ors* [1990] 2 CLJ 58'. Further, it was held that as the fourth defendant in the quoted case had agreed to the terms contained in the agreement, therefore the fourth defendant was bound by it. It was also on those

terms that the plaintiff had agreed to grant the facility to the first defendant. The fourth defendant could not resile from those terms.

[91] It had also been held in the case of *Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor* [2004] 7 MLJ 513; [2004] 3 CLJ 272 that parties to an agreement can by agreement contract out of the Contracts Act 1950 unless the terms are clearly inconsistent with the Act.

[92] It was the plaintiff's contention that cl 29 of the LO was tainted with uncertainty. It is also trite that a contract should not be void for uncertainty unless it could not resolve the ambiguity which it is said to contain (see *Innotec Asia Pacific Sdn Bhd v Innotec Gmbh* [2007] 8 CLJ 304). The terms of cl 29 is clear, unequivocal and did not contain any ambiguity that this court must interpret in order to give effect to these clear words of cl 29 of the LO. In view of the above reasoning the plaintiff's challenge with regard to cl 29 of the LO was without any basis and ought to rejected by this court.

Whether discretion under cl 29 of the LO properly exercised

[93] The defendant had rightfully exercised its discretion under cl 29 of the LO citing the reason 'due to unfavourable biodiesel market outlook'. The evidence adduced during the trial showed that the credit risk analysis report prepared by DW2 showed that the average CPO price was higher than the assumed biodiesel selling price. Further, as the plaintiff was not an integrated player in the biodiesel field to source its supply from the open market the plaintiff had to subject itself to the fluctuations of the CPO price on the upward trend. Due to these reasons, the project was not viable.

[94] In the course of preparing the report, DW2 had relied on the public record of MPOB where the data extracted form part of and/or was based on data, which formed part of the records of MPOB, which is a governmental body, entrusted with the task to promote and develop the palm oil industry. MPOB is also responsible to furnish its records and/or information to the public at large as the government's initiative in promoting the industry. Hence, pursuant to s 57 of the Evidence Act 1950 the court is entitled to take judicial notice of the public records and accept it as evidence (see *Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd* [2010] MLJU 1737; [2011] 3 CLJ 159).

[95] The evidence of DW2 was supported by the evidence of DW3 who was a senior research officer of MPOB and an independent witness who had been directly involved in the analysis of the production costs of biodiesel in Malaysia. DW3's day to day job includes assessment of projects, analysis of statistics, surveys on production costs of palm oil as well as to give lectures on topics touching the palm oil industry. DW3 had confirmed that for the year

2007 the average selling price of CPO was RM2,665 per ton or USD775 per ton. As at 6 August 2007 the average CPO price had gone up around USD762 (RM2,600) p/MT higher than the projected selling price of biodiesel at USD720 p/MT. The plaintiff was not an integrated player in the biodiesel industry and it had to source its supply from open market and would be subjected to fluctuations of the price of CPO on upward trend making the project not viable. I am satisfied that the evidence of DW2 was supported by the evidence of DW3 whose evidence was based on the records of MPOB and was not his assumption or opinion.

[96] Even PW1 confirmed that the increase in CPO price to USD762 will result in the increase in cost of the overall costs of production to USD70,774,000. PW1 had also agreed that the loss of USD45,682,000 would wipe up the whole project. Hence the estimated loss would be USD45,682,000.

[97] DW3 had also testified that with regard to CPO price the benchmark would be at the Commodity Trading/Exchange Market Rotherdam, Chicago and Kuala Lumpur. The global reference point would be these three centres. DW3 testified that the MPOB average biodiesel price in Malaysia was USD736 p/MT and USD692 in Indonesia after the discount of export tax.

[98] Further, the plaintiff had not challenged the evidence of DW2 and DW3 based on the accuracy of the MPOB's record and/or call for evidence to prove otherwise. The plaintiff did not even 'put' or 'suggest' to the defendant's witness during cross-examination that DW3's reliance on the MPOB's data and information was erroneous or flawed in any way. The plaintiff was deemed to have accepted the evidence as correct. In the absence of any evidence to the contrary, which the plaintiff failed to adduce, especially pertaining to the use of Jatropha as a cheaper and readily available alternative, I accepted the evidence of the defendant on the viability of the project. Therefore, the defendant has discharged the burden to prove that the biodiesel market outlook was indeed unfavourable.

[99] This principle of law had been illustrated in the often quoted case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 where the court held that as a general rule the failure to cross-examine a witness on a material point tantamount to an acceptance of that evidence. There was no suggestion by learned counsel for the plaintiff to DW3 that the data of MPOB was flawed and unreliable.

Whether defence of misrepresentation an 'Afterthought'

[100] The plaintiff claimed that the facts disclosed that there were no communications between the plaintiff and the defendant which had induced the defendant in issuing the LO. Even if there was misrepresentation, the defendant ought to have protested at the earliest possible opportunity or raise the same in its communications. This line of defence was tainted with mala fide. Therefore, the conduct of the defendant was merely an afterthought. Further, the defendant had not proved by way of evidence that there were misrepresentations. The defendant on the other hand had pleaded three types of misrepresentations, fraudulent, negligent and/or innocent misrepresentations, against the plaintiff.

[101] Based on the facts that I had narrated above it was not disputed that the plaintiff had made various representations in its loan application before the LO was issued as well as representations with regards to its various addresses. The defendant had also relied on all these representations and was induced to have issued the LO. The facts which were misrepresented to the defendant were:

(a) the plaintiff was incorporated on 19 January 2007 by way of deed of establishment and legalisation by the Minister. The application for the facility was made on 8 September 2006. At the time the application was made the plaintiff was not in existence yet (see p 13 B1, pp 1–87 of B2 and p 86 of B1);

(b) from the above documents the composition of the board of directors and the share structure were unknown and doubtful (see p 13 of B1);

(c) the plaintiff was not able to prove and/or show evidence that it had embarked into the project and/or performed the terms and conditions stated in the LO including entering into agreements with third parties;

(d) the plaintiff had not shown by way of credible evidence it had purchased and/or leased the land meant for the project be it Batam Island or Dumai Port;

(e) the plaintiff was not able to prove that the plaintiff was owned and managed by persons of Malaysian origin with expertise in the field of agriculture, manufacturing and biotechnology;

(f) the propose contractor KPB was struck out by CCM and it did not have any business. There was no evidence to prove that it was part of the Konpro Group as claimed. There was also no evidence to show the shareholders or managing director of Konpro Group was one Dato' Ramanan Ramakrishnan (see exh 'D3' at pp 322–327 of B3); and

(g) as shown above the plaintiff was not mandated to venture into the project and enter into the facility agreement with the defendant by the majority shareholders of OGL.

[102] Based on the above facts, the representations that were made to the defendant at the time of the application for the facility were false. The defendant had realised about these misrepresentations during the proceeding in relation to encl 8. Due to this reason the LO was void at the option of the defendant (see *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460; [2003] 3 CLJ 227; *Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor* [2011] 5 MLJ 309; [2011] 9 CLJ 133)

[103] The principles that could be deduced from the above quoted cases are:

(a) Misrepresentation is 'a false pre-contractual statement that induces a contract or other transaction'.

(b) 'It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of a mind that is free of deceit and inadvertence'.

(c) 'If misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement'.

(d) 'If the representation was made negligently, the remedy of the representee lies in damage directly flowing from the fraudulent inducement'.

(e) 'Negligent representation is generally confined to cases where a duty is imposed to take care in making statements. Such a duty may arise under a contract, where the parties stand in a fiduciary relationship …'

(f) 'A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages'.

(Also see ss 18, 19 and 65 of the Contracts Act 1950).

[104] From the evidence adduced, the following was observed:

(a) the plaintiff despite having full knowledge of the fact that it had not obtained the necessary mandate to venture into the project and/or mandate to enter into the facility agreement had kept away this crucial information from the defendant;

(b) the revocation/termination of the facility was also suppressed from the BOD of OGL and also its shareholders;

(c) there was no evidence of the plaintiff embarking into the project and/or performed the terms and conditions of the LO. There was also no evidence that the plaintiff had entered into agreements with the third parties as claimed;

(d) the purported engagement with KBP was questionable;

(e) the structure of the plaintiff's company, assets and commitments of the plaintiff was not proved. Even the plaintiff's witnesses who testified in

court were not able to prove that they have the authority and/or mandate to be the plaintiff's witnesses; and

(f) as illustrated in the defendant's case (see p 18) the various addresses given by the plaintiff were mysterious and not registered with the proper authority.

[105] In view of the above I am satisfied that there were elements of misrepresentations involved in the dealings with the defendant and the plaintiff had caused the defendant to be induced to issue the LO to part-finance the project by these misrepresentations.

[106] In fact, the plaintiff had a duty as an applicant for the said financing to disclose truthful information with regards to all facts which were material to the application for the same to be considered by the defendant. Based on the facts, which I had attempted to illustrate above, the plaintiff had breached its duty of care to the defendant by making those misrepresentations. It was not disputed that the defendant had relied on all the representations that were made, believed that those representations were true and accepted them. Therefore there was clear evidence that the defendant was misled into believing the same to be true and issued the LO. As a consequence of that, the defendant had also suffered damages.

[107] Despite the fact that the defendant had only stated in the revocation/termination letter that the LO was revoked based on unfavourable market outlook for biodiesel, it did not mean that the defendant could not rely on other grounds that it had discovered later to justify its act in issuing the LO. There was no common rule that it was a condition precedent that a notice must be first given by the defendant correctly, specifying the grounds on which the power was being exercised. The defendant was entitled to justify the revocation/termination if the object facts which justify the taking of the step existed at the material times even though at the time the steps were taken the defendant did not know of the facts. The contents of para 87 above are repeated herein.

[108] On the evidence before me having been evaluated in its entirely I am satisfied that the plaintiff had failed to establish its case on the balance of probabilities. Therefore, I dismissed the plaintiff's claim with costs. Having evaluated the defendant's counterclaim I am satisfied that the defendant had managed to establish its case against the plaintiff on the balance of probabilities. I therefore allowed the prayers sought by the defendant as in prayers 37(A), (C), (E) and (F) with damages to be assessed by this court.

[109] In view of the foregoing the issues for this court's determination must be answered in the following manner:

(a) Whether the plaintiff breached the terms and conditions of the letter of offer and therefore warrants the revocation?

Answer: The answer is in the affirmative;

(b) Whether the letter of offer has come to an end when the plaintiff unilaterally changed the terms and/or inserted new terms into the letter of offer?

Answer: The answer is in the affirmative;

(c) Whether cl 29 of the letter of offer was rightly exercised?

Answer: The answer is in the affirmative;

(d) Whether the plaintiff is estopped from challenging the validity of the revocation?

Answer: The answer is in the affirmative;

(e) Whether the letter of offer is vitiated by misrepresentations?

Answer: The answer is in the affirmative; and

(f) Whether the plaintiff is entitled to claim damages?

Answer: The answer is in the negative.

CONCLUSION

[110] On the totality of the evidence adduced by the plaintiff and the defendants through their witnesses, both testimonial and documentary, and having evaluated the evidence I am satisfied the plaintiff had failed to discharge the onus of establishing his pleaded case against the defendants on the balance of probabilities. Hence, the plaintiff's claim is dismissed with costs. In arriving at the above decision, I had carefully considered the evidence adduced by the plaintiff and the defendants both testimonial as well as documentary, the submissions by both by the plaintiff as well as the defendants and the authorities tendered in support of their respective submissions.

[111] Lastly, I would like to express my sincere appreciation to both learned counsel who had diligently and professionally conducted the trial before me and assisted me with their well-researched submissions to enable me to decide this case.

Plaintiff's claim dismissed with costs and prayers sought by the defendant allowed.

Reported by Kanesh Sundrum